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No. 04-1414

IN THE

Supreme Court of the United States

UNITED STATES OF AMERICA

Petitioner,

v.

JEFFREY GRUBS

Respondent.

On a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF FOR RESPONDENT

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QUESTION PRESENTED

Whether warrants issued in advance of present probable cause are constitutionally infirm or, if permissible in limited circumstances, whether anticipatory warrants must particularly state the triggering condition, the occurrence of which is required for the valid operation of the warrant.

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CONSTITUTIONAL PROVISION INVOLVED

The Fourth Amendment provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

STATEMENT

On April 17, 2002, Postal Inspector Gary Welsh applied to a magistrate judge for an anticipatory warrant to search Respondent's home after the delivery of a videotape. Pet. App. 4a, 30a, 52a-77a. The statute cited in the warrant was 18 U.S.C. § 2252(a)(2), Pet. App. 52a, which prohibits *knowing* receipt or possession of child pornography, *id.* at 56a. Despite the clear statutory requirement of knowledge, the affidavit identifies the event that triggers the valid execution of the warrant ("triggering condition") as acceptance of the mail package by "Grubbs *or any other individual* at the residence," *id.* at 57a (emphasis supplied), or receipt "by person(s) presenting themselves as the authorized recipients of correspondence . . . addressed" to Grubbs' address, *id.* at 71a.

On the morning of April 19, 2002, a package was accepted by Grubbs' wife at the Grubbs' residence. Within minutes of Mr. Grubb's wife acceptance of the package, ten armed law enforcement officers approached Mr. Grubbs' house to execute an anticipatory search warrant. Pet. App. 6a, J.A. 39-40. Three officers detained Mr. Grubbs, J.A. 42, while several other officers entered the home and began the search. Pet. App. 6a. The remaining officers detained Mr. Grubbs' wife and two children outside. J.A. 77.

Grubbs' wife began to ask the officers what they were doing there. J.A. 7, J.A. 104. She continued to ask about the nature of the officers' business throughout the entirety of the search, which ended at about 1:30 that afternoon. *Id.* at 105. Despite her repeated questions, she was never told anything about the nature of the search or the reason for its occurrence, and she was never provided a copy of the warrant. Indeed, she "never saw a piece of paper." *Id.* at 104.

Over thirty minutes after Mr. Grubbs' seizure and the search of the house, the armed officers escorted Mr. Grubbs inside the house. Pet. App. 7a-8a. Inspector Welsh placed a copy of the search warrant on the table at which Mr. Grubbs was seated.[1] *Id.* The copy of the warrant was folded in thirds so that what was visible to Mr. Grubbs was the seal of the United States. J.A. 92-93. The affidavit in support of the warrant was not attached. Pet. App. 8a.

The "inartfully drafted" search warrant, Pet. App. 5a, was prepared on a form "forthwith" warrant, which inaccurately stated that the warrant was immediately valid to search for items known to be at the identified address at the time of the issuance. Despite the handwritten word "anticipatory" at the top of the document, the warrant commanded the immediate search of the premises. *Id.* at 47a. The warrant itself did not state what triggering conditions needed to occur in order to make the warrant valid. *Id.* at 5a. It is conceded that only the affidavit contains any reference to the triggering condition, and it is further conceded that the affidavit was never presented to Mr. Grubbs or to anyone else present that day. In fact, the only evidence ever presented about the whereabouts of the affidavit that day comes from an agent's

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[1] According to the declaration submitted following the evidentiary hearing, after the matter had been highlighted, the warrant placed on the table included Attachments A and B, which described the place to be searched and items to be seized. There was no live testimony as to this fact, and there was no opportunity either to cross-examine the officer or to rebut his testimony.

one-time answer during an evidentiary hearing that the search warrant affidavit was "at the site of the search." J.A. 82.

In sum, a copy of the warrant was presented to Mr. Grubbs over thirty minutes after the commencement of the search. That document, though denominated an "anticipatory" warrant, nowhere stated the conditions upon which it was valid. Grubbs' wife was never shown the warrant, despite her repeated inquiries as to the nature of and reason for the officer's presence. Not one copy of the attachments (the only portion of the document particularly describing the place to be searched and items to be seized) were left with anyone at Mr. Grubbs' residence. And the affidavit – the only document describing the triggering condition – was not presented to Mr. Grubbs (or anyone else present for the search).

Despite the shortcomings of the warrant and its presentation to Mr. Grubbs, the district court denied Mr. Grubbs' motion to suppress, concluding that all legal requirements had been met. Pet. App. 38a. After the district court denied Mr. Grubbs' motion to reconsider, *id.* at 20a-28a, he entered a conditional guilty plea, reserving his right to appeal the ruling on the suppression motion. *Id.* at 10a.

On that appeal, the Ninth Circuit reversed the denial of respondent's suppression motion. *Id.* at 3a-19a. The court held that the Fourth Amendment requires that a triggering condition be particularly stated on the face of the warrant (or cured by incorporation). *Id.* at 12a. Because the triggering condition was not on the face of the warrant and because the affidavit was never presented to Mr. Grubbs (or anyone else present on the day of the search), the warrant was invalid and the search violated the Fourth Amendment. *Id.* The court thus held that all evidence seized must be suppressed. *Id.* at 17a & n.10.

SUMMARY OF ARGUMENT

The text of the Fourth Amendment requires that warrants be issued *only upon* probable cause.[2] The Constitution does not say that warrants may be issued in anticipation of probable cause or upon the manifestation of probable cause at a future time. Consistent with this plain language, the Court has held that: "A search warrant . . . is issued upon a showing of probable cause to believe that the legitimate object of a search *is* located in a particular place . . . ." *Steagald* v. *United States*, 451 U.S. 204, 213 (1981) (emphasis supplied). In the ordinary (non-anticipatory) case, the requirement of present probable cause is easily met – at the moment of issuance, the warrant is valid because there is probable cause to believe that the items to be seized are located at the place to be searched. That is not the case with respect to anticipatory search warrants.

An anticipatory warrant "is a warrant based upon an affidavit showing probable cause that at some future time (but not presently) certain evidence of crime will be located at a specified place." 2 Wayne R. LaFave, *Search and Seizure: A Treatise on the Fourth Amendment* § 3.7(c), at 398 (4th ed. 2004); see also *United States* v. *Garcia*, 882 F.2d 699, 702 (2d Cir. 1989) ("An anticipatory warrant . . . is a warrant that has been issued before the necessary events have occurred which will allow a constitutional search of the premises; if those events do not transpire, the warrant is void."). By definition, an anticipatory warrant is issued in advance of the existence of probable cause, violating the express textual command of the Fourth Amendment.

A search warrant "serves a high function." *McDonald* v. *United States*, 335 U.S. 451, 455 (1948). It interposes

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[2] The Fourth Amendment "is to be liberally construed and all owe the duty of vigilance for its effective enforcement lest there shall be impairment of the rights for the protection of which it was adopted." *Go-Bart Importing Co.* v. *United States*, 282 U.S. 344, 357 (1931).

between the police and the public a neutral magistrate, who weighs the needs of law enforcement against a citizen's right of privacy. *Id.* "At the very core" of the Fourth Amendment "stands the right of a man to retreat into his own home and there be free from unreasonable governmental intrusion." *Silverman* v. *United States*, 365 U.S. 505, 511 (1961).

The Government now seeks to undermine these well-accepted principles. The Government draws an arbitrary distinction between the time of issuance and the time of execution, maintaining that even though the warrant is invalid at the time of issuance, the executing officers are able to confer validity upon the warrant *nunc pro tunc* by manufacturing the anticipatory conditions. Nowhere is that distinction contemplated in the text of the Fourth Amendment or in the purpose underlying it. The Constitution refers to only one period, and that is the time of *issuance*. See U.S. Const. amend. IV. ("no Warrants shall *issue*, but upon probable cause") (emphasis supplied). The proposition that officers may be imbued with the power and authority to render improper warrants valid through their own efforts and discretion is entirely atextual and an anathema to the history and purposes of the amendment. A fundamental purpose of the Fourth Amendment was to limit the discretion of law enforcement. See *Berger* v. *New York*, 388 U.S. 41, 58 (1967). In pursuit of this goal, the Framers opted to require that "a neutral and detached authority be interposed between the police and the public." *Id.* at 54. It defies both history and logic to suggest, as Petitioner does, that somehow the discretionary acts of the involved law enforcement officers can in any way serve the purpose of checking executive power.

The Fourth Amendment was born out of a deep distrust of law enforcement power and a deep respect for individual liberty. The Government now claims that a warrant constitutionally insufficient at the time of issuance is 'cured' for one of two reasons. First, if the warrant is supported by probable

cause at the time of execution, there is no harm and no foul. But this is patently wrong. The Constitution nowhere contemplates that an invalid warrant is like a blank check that can become valid in the event that it is executed when probable cause exists. In fact, similar claims have been resoundingly rejected by this Court. See, *e.g.*, *Katz* v. *United States*, 389 U.S. 347, 356 (1967) (stating it is not enough that an agent act with restraint where the restraint is "imposed by the agents themselves, not by a judicial officer").

Alternatively, the Government claims that if the warrant is executed before the triggering condition has occurred, all is to be forgiven because any evidence thereby gained will be suppressed upon after-the-fact review. Again, this misunderstands the purpose of the Fourth Amendment. The Fourth Amendment is designed to create *ex ante* procedures to safeguard individual rights. Those rights become meaningless if the only protection afforded them involves post-hoc challenges. See *Beck* v. *Ohio*, 379 U.S. 89, 96 (1964) (noting it is not sufficient to "bypass the safeguards provided by an objective predetermination of probable cause," and instead substitute "the far less reliable procedure of an after-the-event justification for the . . . search, too likely to be subtly influenced by the familiar shortcomings of hindsight judgment"). The Government's logic vitiates the purpose behind interposing a neutral magistrate, which is to prevent a search without probable cause in the first instance and not merely to provide an ineffectual precursor to later, corrective measures. If after-the-fact review were enough to protect the interests served by the Fourth Amendment, the language of the Amendment would be entirely different.

The Government asserts that to require that the triggering condition be stated on the face of the warrant is to judicially amend the Constitution. But this too is wrong. The Constitution assumes that a warrant is issued by a neutral magistrate upon a showing of contemporaneous probable cause. Assuming the existence of this valid warrant, the

Constitution requires that the warrant particularly describe the place to be searched and the things to be seized. However, in the case of an anticipatory warrant, the necessary prerequisite is not met: there has been no *ex ante* finding of probable cause. The Government cannot have its cake and eat it too by strictly construing one phrase of the amendment (the particularity requirement as to the place to be searched and the things to be seized) and loosely construing another ("no Warrants shall issue but upon probable cause"). In reality, the question presented by the Government is a question not answered by the text. That question asks what must be stated on the face of an anticipatory warrant (assuming such a warrant ~~can be~~ validly issued at all) in light of the peculiar circumstances presented by those warrants.

The text of the Fourth Amendment is ambiguous as to the answer to this question except, as noted, to call into question the very validity of such warrants in the first instance. Thus, the answer must be sought in the history and purpose of the Fourth Amendment. Those principles unambiguously require that the triggering condition – a precondition to the valid execution of the warrant – must particularly appear on the face of the warrant. This is the only way that the Warrant Clause can achieve its purpose of "assur[ing] the individual whose property is searched or seized of the lawful authority of the executing officer, his need to search, and the limits of his power to search." *United States* v. *Chadwick*, 433 U.S. 1, 9 (1977), *abrogated on other grounds by California* v. *Acevedo*, 500 U.S. 565 (1991).

The Government asks this Court to sanction a power that is neither supported by the history or text of the Fourth Amendment. Yet in the face of this extraordinary request, the Government rejects the Court of Appeals' attempt to restrict the scope of this new power by enhancing the particularity requirement. Instead, the Government makes a fallacious appeal to the very component of its authority that the Framers sought to cabin – the exercise of its discretion. And because

the Fourth Amendment was enacted out of a deep distrust for the exercise of discretion in the conduct of house searches, the Government's appeal to its own good faith runs headlong into the history and purpose of the Fourth Amendment once again.

Because adopting the Government's position here would create a constitutional rule that is an anathema to the constitutional text and would contravene the purpose of the Fourth Amendment, this Court should affirm the ruling below.

ARGUMENT

I. ANTICIPATORY SEARCH WARRANTS ARE UNCONSTITUTIONAL BECAUSE THEY ARE ISSUED IN THE ABSENCE OF CONTEMPORANEOUS PROBABLE CAUSE.

A. The Text Of The Fourth Amendment Prohibits Anticipatory Search Warrants.

Anticipatory search warrants are unconstitutional.[3] *United States* v. *Ricciardelli*, 998 F.2d 8, 19 (1st Cir. 1993) (Torruella, J., concurring) ("Anticipatory search warrants are

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[3] The Court can consider this issue even if it was not directly raised in the petition for certiorari. *See* Sup. Ct. R. 15.2 (a nonjurisdictional argument not raised in a brief in opposition to a petition for a writ of certiorari "may be deemed waived"); *see also Caterpillar, Inc.* v. *Lewis*, 519 U.S. 61, 75 n.13 (1996). Where, as here, the resolution of the broad constitutional question is "predicate to an intelligent resolution of the question presented," *id.* at 75 n.13 (internal quotation marks omitted), the Court may regard the question "as 'fairly included' within the question presented." Further, Respondent is free "to defend the judgment below on any ground which the law and record permit, provided the asserted ground would not expand the relief which has been granted." *Smith* v. *Phillips*, 455 U.S. 209, 215 n.6 (1982); *see United States* v. *New York Tel. Co.*, 434 U.S. 159, 166 n.8 (1977) (considering issue not within the question posed in the petition for certiorari). The Court permits a respondent to defend a judgment on grounds not directly "pressed or passed upon . . . below"

violative of the Fourth Amendment.").[4] The text of the Fourth Amendment provides that "no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." U.S. Const. amend. IV. The text is clear: probable cause is a necessary prerequisite to the *issuance* of a search warrant.[5] See *Steagald* v. *United States*, 451 U.S. 204, 213 (1981); *United States* v. *Salvucci*, 599 F.2d 1094, 1096 (1st Cir. 1979), *rev'd on other grounds*, 448 U.S. 83 (1980).

By their very nature, anticipatory warrants are predicated on the occurrence of a future event.[6] See 2 Wayne R.

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when the case involves an appeal from a federal court judgment. *Kentucky* v. *Stincer*, 482 U.S. 730, 747 n.22 (1987).

[4] *See United States ex rel. Beal* v. *Skaff*, 418 F.2d 430, 433 (7th Cir. 1969) ("[A] warrant which antedates the commission of the offense which is relied upon to support its issuance might lack an essential element of judicial control: the requirement that probable cause exist to believe that execution will not precede the commission of the crime or possession of the goods to be seized.").

[5] Petitioner attacks the Ninth Circuit's rule as being a "judicial amendment of the Warrant Clause." Pet. Br. at 23, 12-16. In fact, it is the fundamental premise on which Petitioner's argument is based – that anticipatory warrants are permissible – that rewrites the Warrant Clause.

[6] Anticipatory search warrants can be distinguished from wiretaps on a number of grounds. First, unlike an anticipatory warrant, a wiretap is necessarily based on existing probable cause and occurs without regard to the occurrence of any future event. *See, e.g., Berger* v. *New York*, 388 U.S. 41, 55, 58-59 (1967) (describing probable cause as requiring a showing that an "offense has been or is being committed" and demanding a showing of "present probable cause"). Although the communication to be tapped will occur in the future, probable cause to believe that a crime has been (or is being) committed exists at the moment of issuance. That is not so with respect to anticipatory warrants. Further, because of the intrusive nature of wiretaps, they are required to be very closely supervised and protective procedures must be carefully drawn. *See, e.g., id.* at 58-60, 62-64. Generally, exigent circumstances must be shown since no notice is provided to the target. *See, e.g., Ker* v. *California*, 374 U.S. 23 (1963). Finally, offenses that may be the predicate for a wire or

LaFave, *Search and Seizure: A Treatise on the Fourth Amendment* § 3.7(c), at 398 (4th ed. 2004) (defining an anticipatory warrant as "a warrant based upon an affidavit showing probable cause that at some future time (but not presently) certain evidence of crime will be located at a specified place"). By definition, then, at the moment a neutral judicial officer *issues* an anticipatory warrant, there is no probable cause to search the particularly specified place. See *United States* v. *Rowland*, 145 F.3d 1194, 1201 (10th Cir. 1998) (recognizing that "[p]robable cause for anticipatory warrants is contingent on the occurrence of certain expected or 'triggering' events"). The Government essentially concedes this point. See Pet. Br. at 14 ("[T]he triggering condition is one aspect of the [G]overnment's showing as to why there is probable cause for a search, *once a contingency is satisfied*.") (emphasis supplied). At the moment of *issuance*, an officer would not be permitted to execute the warrant because that warrant lacks probable cause. In fact, the contingency on which the execution of the warrant relies is called a "triggering" condition because it purportedly transforms the previously "invalid" warrant into a valid one; it is the event that creates contemporaneous probable cause. Accordingly, an anticipatory warrant is invalid at the moment it is issued and is unconstitutional.[7]

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oral interception order are limited to only those set forth in 18 U.S.C. § 2516(1). In the case of electronic communications, a request for interception may be based on a federal felony, pursuant to 18 U.S.C. § 2516(3).

[7] Even if this Court deems anticipatory warrants constitutionally permissible in limited circumstances, the warrant issued in this case must fail. This warrant was not only *issued* in the absence of probable cause, but is constitutionally infirm for the additional reason that it was *executed* in the absence of probable cause. The crime here at issue is 18 U.S.C. § 2252(a)(2), which prohibits *knowing* receipt or possession of child pornography. Pet. App. 52a, 56a; *see also United States* v. *Gendron*, 18 F.3d 955, 957-58 (1st Cir. 1994) (Breyer, J.) (finding that 18 U.S.C. § 2252(a)(2) requires that the Government prove the defendant knowingly received child pornography). The affidavit here allowed execution when

This conclusion also necessarily follows from this Court's interpretations of the Fourth Amendment's "probable cause" language. "A search warrant . . . is issued upon a showing of probable cause to believe that the legitimate object of a search *is* located in a particular place . . . ." *Steagald*, 451 U.S. at 213 (emphasis supplied); see also *Berger* v. *New York*, 388 U.S. 41, 55 (1967) ("Probable cause . . . exists where the facts and circumstances within the affiant's knowledge . . . are sufficient unto themselves to warrant a man of reasonable caution to believe that an offense has been or is being committed."); *United States* v. *Loy*, 191 F.3d 360, 365 (3d Cir. 1999) (noting that a search warrant must "be supported by probable cause at the time it is issued," but concluding that anticipatory warrants are not invalid per se); *Mapp* v. *Warden*, 531 F.2d 1167, 1171 (2d Cir. 1976) (stating that probable cause must be demonstrated as of "the date the warrant was issued"); *Durham* v. *United States*, 403 F.2d 190,

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any person at Mr. Grubbs' residence accepted the package. See Pet. App. at 57a, 71a. However, receipt by anyone other than Mr. Grubbs could not establish probable cause that the crime at issue had been committed, as there would not have been a *knowing* receipt unless Mr. Grubbs himself received the package. In the child pornography cases cited by the Government, the triggering condition specified that the *defendant* had to receive the contraband. *See, e.g.*, *Gendron*, 18 F.3d at 965 (stating that the warrant authorized a search "*after delivery by mail to and receipt by Daniel Gendron*," the defendant) (internal quotation marks omitted). In *Gendron*, then, the delivery to the defendant established probable cause that a crime had been committed, and thus the triggering condition was not overbroad. In this case, the triggering condition was overbroad because probable cause could have been absent even after the triggering condition was satisfied. And that is in fact what happened. The triggering condition, as set forth in the affidavit, occurred when Grubbs' wife picked up the package. Five minutes later, the officers executed the search warrant. Pet. App. 31a. No probable cause existed at that time, however, as there had been no *knowing* receipt. Thus, the warrant at issue here is invalid both because the triggering condition was overbroad, leaving too much to the discretion of the officers, and because it was executed in the absence of probable cause. This invalidity provides a separate and independent basis upon which to affirm the ruling below.

193 (9th Cir. 1968) (stating that the facts presented to the magistrate must "justify a conclusion by him that the property which is the object of the search is probably on the person or premises to be searched at the time the warrant is issued"). Cf. *Berger*, 388 U.S. at 59 (noting that continuation of a warrant is insufficient without "a showing of present probable cause"). To be valid, a warrant must be premised on "reasonabl[e] grounds for believing that the immediate search for which authority is sought may be fruitful." *Durham*, 403 F.2d at 193.

The purpose of the probable cause requirement is to keep the state out of constitutionally protected areas until it has reason to believe that a crime has been or is being committed. *Berger*, 388 U.S. at 55. This purpose was "wholly aborted" in this case. *Id.* Here, the conditional event was not an "act in furtherance" of an ongoing conspiracy or a predicate act as part of a RICO enterprise; instead, the triggering event was the core of the crime charged – receipt of the contraband.

Notwithstanding this, the Government now assumes – and the Courts of Appeal have agreed[8] – that anticipatory warrants are somehow constitutional. This assumption is based on the odd notion that a warrant invalid upon issuance can somehow be resurrected by the executing officer's ability to create probable cause at the time of execution.[9] But the

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[8] Courts of appeal have generally upheld the constitutionality of anticipatory warrants. However, this Court has never directly addressed this issue.

[9] The claim that a magistrate might reasonably have faith that the contraband will exist at the place to be searched at some point in the future also fails. First, this argument is undermined by the Government's concession that an anticipatory warrant could not be executed upon its issuance. At the moment of issuance, the warrant is inoperable because there is no probable cause to search at that time. Second, the claim that a magistrate may rely entirely upon her good faith with respect to the establishment of probable cause is to argue that the magistrate should abdicate her core constitutional duty. The parade of horribles that would attend such an abdication is lengthy. For example, nothing would prevent

Constitution nowhere suggests this principle. And, in fact, it makes no sense. The point of the Fourth Amendment is to limit the discretion of law enforcement; it is entirely illogical, then, to argue that a warrant can somehow be saved by an appropriate exercise of executive discretion. This Court has rejected that very claim. See *Katz* v. *United States*, 389 U.S. 347, 356 (1967) ("[T]he inescapable fact is that this restraint was imposed by the agents themselves, not by a judicial officer."). The Fourth Amendment entirely prohibits the *issuance* of an invalid warrant. It does not matter that the anticipatory warrant may be supported by probable cause at the time of execution.

Other rules applicable in the Fourth Amendment context reveal the error in the Government's position. For example, when reviewing a probable cause determination on a motion to suppress, the reviewing court is not permitted to look beyond the evidence that was presented to the magistrate at the time of issuance. See *Whiteley* v. *Warden*, 401 U.S. 560, 565 n.8 (1971) ("[A]n otherwise insufficient affidavit cannot be rehabilitated by testimony concerning information possessed by the affiant when he sought the warrant but not disclosed to the issuing magistrate. A contrary rule would, of course, render the warrant requirements of the Fourth Amendment meaningless.") (internal citation omitted); *United States* v. *Castillo*, 866 F.2d 1071, 1076 (9th Cir. 1988) (review of a magistrate's probable-cause finding "is limited to the information contained within the four corners of the underlying affidavit"); *United States ex rel. Rogers* v. *Warden*, 381 F.2d 209, 215 (2d Cir. 1967) (when reviewing magistrate's assessment of probable cause, court must "consider only that information which was presented to the

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a magistrate from relying upon the officer's understanding of what the nature of the contraband is, or upon the officer's belief as to who was involved in the dissemination of that contraband. In the absence of present probable cause, nothing prevents ill-intentioned officials from manufacturing crimes.

magistrate"). When asking whether there existed probable cause sufficient to uphold the search, a reviewing court does not engage in a wholesale after-the-fact review. Instead, the court must ask only if the facts before the judge at the time of issuance supported a finding of probable cause. It does not matter that at the time of the search probable cause may have existed. What matters is that the findings of the issuing judge are supportable. This rule plainly forecloses the argument that an invalidly issued warrant can be saved if it is supported by probable cause at the time of execution. If this were the case, a reviewing court would not be limited to the evidence presented to the authorizing judicial officer.

Generally, then, the issuance/execution distinction that the Government attempts to draw is completely unsupported and unsupportable in this context. That distinction makes sense when the question is whether the officer has waited too long to execute the warrant. There, courts are not retroactively conferring validity upon an otherwise invalid warrant. Rather, courts are upholding validly issued warrants so long as the search was still supported by probable cause at the time of execution. See *United States* v. *Gerber*, 994 F.2d 1556, 1560 (11th Cir. 1993) ("Federal courts . . . have concluded that completing a search shortly after the expiration of a search warrant does not rise to the level of a constitutional violation and cannot be the basis for suppressing evidence seized so long as probable cause *continues* to exist . . . .") (emphasis supplied). In that circumstance, the warrant was valid upon its issuance; there was no constitutional violation. The only question is whether the search was also properly executed. That line of cases does nothing to aid Petitioner's argument that if the warrant is *executed* upon probable cause (as determined by the officer), it confers validity nunc pro tunc upon a warrant that was not issued "upon probable cause," as the Constitution unambiguously requires. Nothing in this Court's Fourth Amendment jurisprudence suggests that such liberties can be taken with the constitutional text when

the result is to infringe upon individual liberties. See *Go-Bart Importing Co.* v. *United States*, 282 U.S. 344, 357 (1931) (instructing that the Fourth Amendment "is to be liberally construed and all owe the duty of vigilance for its effective enforcement lest there shall be impairment of the rights for the protection of which it was adopted").

Anticipatory warrants leave to the executing officer the power to determine when precisely probable cause to search exists. Any restraint will be "imposed by the agents themselves, not by a judicial officer." *Katz*, 389 U.S. at 356. "[B]ypassing a neutral predetermination of the scope of a search leaves individuals secure from Fourth Amendment violations 'only in the discretion of the police.'" *Id.* at 358-59 (quoting *Beck* v. *Ohio*, 379 U.S. 89, 96 (1964)). "As with general warrants, this leaves too much to the discretion of the officer executing the order." *Berger*, 388 U.S. at 59. Conferring discretion upon an officer to determine when probable cause exists undermines the entire point of requiring that the probable cause determination be made by a neutral magistrate.

At bottom, anticipatory warrants are issued in the absence of present probable cause. As the Government concedes, an anticipatory warrant could not be executed upon issuance because at that time, there is no probable cause to search. Because probable cause does not exist at the time of issuance – the only constitutionally significant event – anticipatory warrants are unconstitutional. They cannot be later resuscitated. Because anticipatory warrants are invalid per se, the ruling below should be affirmed.

B. Modern Police Practices Alter The Constitutional Balance.

The requirements of the Fourth Amendment "are not inflexible, or obtusely unyielding to the legitimate needs of law enforcement." *Berger*, 388 U.S. at 63 (internal quotation marks omitted). Thus, the Fourth Amendment must be

interpreted in light of legitimate law enforcement needs. And perhaps, at one time, those legitimate needs supported a more expansive reading of the Fourth Amendment's probable cause requirement. However, in the face of modern police enforcement, no legitimate needs could possibly justify anticipatory warrants.

At one time, the choice may have been between a significant risk of lost evidence, searching with an anticipatory warrant, or searching under the exigent circumstances requirement. Now, there are numerous other options – principally, telephonic warrants[10] – that are designed to eliminate just such dilemmas in the field. Because of these modern realities, a clear rule prohibiting anticipatory warrants would not significantly burden law enforcement.

Today, there are numerous means by which the police may seek warrants quickly—without resorting to anticipatory warrants or the exigent circumstances requirement. Thus, there is no compelling need that justifies so clear a departure from the text and purpose of the Fourth Amendment. And "it is not asking too much that officers be required to comply with the basic command of the Fourth Amendment before the innermost secrets of one's home or office are invaded." *Id.*

II. IF ANTICIPATORY WARRANTS ARE DEEMED VALID IN CERTAIN CIRCUMSTANCES, THEY MUST PARTICULARLY STATE THE TRIGGERING CONDITION ON THEIR FACE.

A. The Text Does Not Speak To What Must Be Particularly Stated On The Face Of Anticipatory Warrants.

The Government seeks to have this Court legitimize an entirely new category of warrants, one that does not require

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[10] *See* Fed R. Crim. P. 41 (authorizing telephonic warrants).

probable cause at the time of issuance.[11] Despite the grave constitutional questions presented by anticipatory warrants, see *supra*, the Government argues that the requirements applicable to such warrants are easily answered by the text. However, the constitutional text does not alone resolve this specific question.[12] See *Crawford* v. *Washington*, 541 U.S. 36, 42-43 (2004).

The Fourth Amendment states that when a warrant is issued upon probable cause, that warrant must "particularly describ[e] the place to be searched, and the persons or things to be seized." U.S. Const. amend. IV. This textual requirement presumes the existence of probable cause at the time of issuance. Anticipatory warrants, however, are issued in the absence of a showing of present probable cause, and, as is conceded, are only valid upon the occurrence of a contingent event, the triggering condition. Thus, they present grave constitutional questions. *Ricciardelli*, 998 F.2d at 12 (stating that "a warrant conditioned on a future event presents a potential for abuse above and beyond that which exists in more traditional settings: inevitably, the executing agents are called upon to determine when and whether the triggering event specified in the warrant has actually occurred").

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[11] The Government may argue that probable cause that the contraband will be found at the particular place at some point in the future is sufficient to meet the constitutional standard. This does nothing to save the Government's particularity argument. It is beyond dispute that the occurrence of the triggering condition is a precondition to the valid execution of the warrant and thus provides a significant limitation on the power of the officer to search. It is for this reason that the triggering condition must be particularly stated, as is argued *infra*.

[12] The text assumes that a warrant is issued only upon a finding of present probable cause. The argument that the Fourth Amendment somehow speaks to what requirements apply in the case of an anticipatory warrant, which is not valid at the time of issuance simply makes no sense. Such warrants are not contemplated in the text, and any attempt to graft the textual requirements onto anticipatory warrants would be an artificial exercise.

The requirements that attend anticipatory warrants must be construed in light of their constitutional doubt. See *Berger*, 388 U.S. at 56. Where the use of particular techniques raise "grave constitutional questions under the Fourth" Amendment, the Court assumes "a heavier responsibility . . . in its supervision of fairness procedures." *Id.* (internal quotation marks omitted). Because the answer is not found on the face of the text,[13] this Court must turn to the history and purpose of the Fourth Amendment. *Crawford*, 541 U.S. at 42-43.[14]

B. The Purpose Of The Warrant Clause Can Be Realized Only If The Triggering Condition Of An Anticipatory Warrant Is Particularly Listed On Its Face.

The Fourth Amendment provides protection against government overreaching by requiring that "inferences be

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[13] The triggering condition could also be required by the Fourth Amendment's command that the place to be searched and items to be seized be particularly stated on the face of the warrant. In the case of an anticipatory warrant, simply stating the address or location of the place to be searched is not sufficient to specifically identify the particular place that will be searched. The place identified can only be searched after a certain triggering condition is satisfied. Thus, the triggering condition is a necessary additional component of the identification of the place to be searched and thus is encompassed by the requirement that the place be particularly stated.

[14] The Government seeks to have it both ways. The Government first wants this Court to allow anticipatory warrants, which are not contemplated by the text of the Constitution. After succeeding in advocating a broad, atextual interpretation of the probable cause requirement, the Government asks this Court to interpret strictly the text of the Fourth Amendment's particularity requirement. The Government, though, cannot have it both ways. If the text governs, then anticipatory warrants are forbidden per se. If the text does not, then the particularity requirement cannot be read in a manner that would undermine the purpose of the Warrant Clause. The Government's attempt to have it both ways runs counter to the rule that the Fourth Amendment must "be liberally construed . . . lest there shall be impairment of the rights for the protection of which it was adopted." *Go-Bart Importing Co.*, 282 U.S. at 357.

drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime." *Johnson* v. *United States*, 333 U.S. 10, 13-14 (1948). Removing the neutral magistrate from this role "would reduce the Amendment to a nullity and leave the people's homes secure only in the discretion of police officers." *Id.* at 14. Anticipatory search warrants vest discretion in the executing officers by allowing magistrates to issue warrants without making a complete finding of probable cause. In light of this fact, the Fourth Amendment's purpose must be closely analyzed to assure that any rule adopted in this context appropriately safeguards the interests protected by the Fourth Amendment.

The warrant requirement is intended to assure several critical things. First, the warrant requirement is intended to remove discretion from the executing officer, and vest that discretion in a neutral magistrate. *Berger*, 388 U.S. at 59. Further, the warrant requirement is intended to "assure[] the individual whose property is searched or seized of the lawful authority of the executing officer, his need to search, and the limits of his power to search." *United States* v. *Chadwick*, 433 U.S. 1, 9 (1977) (citing *Camara* v. *Municipal Court*, 387 U.S. 523, 532 (1967)), *abrogated on other grounds by California* v. *Acevedo*, 500 U.S. 565 (1991); see also *Groh* v. *Ramirez*, 540 U.S. 551, 561 (2004). Without the requirement that the triggering condition be particularly stated on the face of the warrant, each of these critical purposes would be undermined.

In the normal course – where a warrant is issued upon a showing of contemporaneous probable cause – the purpose of the Fourth Amendment is fully served by requiring that only the place to be searched and the items to be seized are included on the face of the warrant. The probable cause determination has been made at the time of the issuance of the warrant, and the primary limits of the officer's power to

search – the items to be seized and the place to be searched – are both clearly stated on the face of the warrant.

This is not so in the case of anticipatory warrants. Merely listing the place to be searched and the items to be seized is insufficient to delineate the limits of the executing officer's power.[15] Where an anticipatory warrant is issued, the most critical limit of the power to search is the triggering condition. At the time of issuance, an anticipatory warrant could not be constitutionally executed. Prior to the occurrence of that triggering condition, the officer has no lawful authority at all. In fact, the warrant is simply inoperable. While a partial probable cause determination may have been made at the time of the anticipatory warrant's issuance, the valid execution of the warrant is contingent upon an externally verifiable, objective event. And the general standard – listing only the place to be searched and items to be seized – does not respond to this special circumstance. It does not identify the power of

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[15] The Government argues that there is no need to include the triggering condition on the face of the warrant as there is no requirement that the individual searched be shown the warrant at the outset of the search. Pet. Br. at 21-22. This argument is flawed on two grounds. First, the argument proves too much. Taken to its logical extreme, it suggests that it is unnecessary to include anything on the face of the warrant since that warrant is not necessarily provided to the searchee prior to the search. But this is not the point. This Court has enunciated the principles that animate the Warrant Clause, and requiring particularity as to the triggering condition serves those purposes in precisely the same manner as does including the place to be searched and items to be seized. Without drawing any distinction as to these categories, the Government's argument is utterly unconvincing because it would seemingly justify disregarding the particularity requirement in toto.

Even more, in *Groh*, this Court left open the question "whether it would be unreasonable to refuse a request to furnish the warrant at the outset of the search when . . . an occupant of the premises is present and poses no threat to the officers' safe and effective performance of their mission." *Groh*, 540 U.S. at 562 n.5. Given Grubbs' wife's continued inquiries and requests, it was unreasonable to refuse to provide her with a warrant at the outset of the search.

the executing officer, or the limits of her power, and it does not provide any check upon her discretion. Without specifying the triggering condition, an anticipatory warrant contravenes the purpose of the Warrant Clause.

Other significant problems arise when the triggering condition is not specified particularly on the face of the warrant. Anticipatory search warrants will often say one thing, and do another. By their terms, they often purport to empower a search at the moment of issuance. In fact, however, no search is permitted until the occurrence of the triggering condition. Including the triggering condition on the face of the warrant is therefore necessary to prevent the warrant from being misleading. The warrant at issue in this case, for example, actually states: "I am satisfied that the affidavit(s) and any recorded testimony establish probable cause to believe that the person or property so described is now concealed o[n] the person or premises above-described and establish grounds for the issuance of this warrant." Pet. App. 47a. Despite this statement, at the moment the magistrate signed the warrant, there was no probable cause to believe that the sought items were concealed on the premises. This anticipatory warrant – by virtue of its language and form – appears to confer immediate authority. But it does not. Instead, the officers have buried deeply into the twenty-one page affidavit, the triggering condition, the occurrence of which (as the Government contends) is necessary to make the warrant valid. Not only does the face of the warrant fail to state this with particularity, but the warrant itself actually misrepresents the nature of the executive's power.[16]

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[16] The Government points out that at the top of the warrant, the word anticipatory was handwritten above the pre-printed words, search warrant. Pet. Br. at 5. However, this fact does nothing to save the defective warrant. It is unclear on the face of the warrant whether the judge actually understood and approved of the anticipatory aspect and the triggering event. Moreover, there is no way to know who wrote "anticipatory" on the warrant, or when it was written. In fact, the Assistant United States Attorney admitted that she wrote the word "anticipatory" on the face of

Generally, we accept police intrusion because we are confident that the existence of a warrant signifies that the probable cause determination has been made by a neutral magistrate and that other significant limits are clearly set forth in the warrant itself. See *Illinois* v. *Gates*, 462 U.S. 213, 236 (1983) ("[P]ossession of a warrant by officers conducting an arrest or search greatly reduces the perception of unlawful or intrusive police conduct."). We do not require that the facts supporting probable cause be included on the face of the warrant because the ultimate determination of probable cause is a legal conclusion, reached after careful consideration of numerous facts. Moreover, we trust that the mere existence of the warrant signifies that the neutral magistrate has made the probable cause determination; without the magistrate's approval, there would be no warrant. But this basic assumption does not hold with regard to an anticipatory warrant. Here, a magistrate has issued a warrant even though the existence of that warrant does not itself establish its sufficiency. More is required. And that more must be particularly stated on the face of the warrant.

The First Circuit agrees that the time at which the warrant becomes valid must be particularly stated in the warrant. *United States* v. *Gendron*, 18 F.3d 955, 965 (1st Cir. 1994) (Breyer, J.) (stating that "a warrant must clearly say when it takes effect"). That court concluded that, although it does not have to be more clearly specified than the place to be searched or items to be seized, "a warrant's restrictions in respect to time and place should be 'similar'" to those specifically mentioned in the Constitution. *Id.* at 966 (quoting *Ricciardelli*, 998 F.2d at 12). The Government's attempt to distinguish the First Circuit cases, Pet. Br. at 25-27, rings hollow. Although it may be the case that the precise issue presented here has not been decided by the First Circuit, that is beside the point. What matters is that the court

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the warrant "because it was not already on there," JA 139-40. There is no evidence as to when this occurred.

unequivocally determined that a warrant must state "when it takes effect." That determination is consistent with Respondent's position and supports the Ninth Circuit's rule.

The rule Respondent advocates – that a precondition to a warrant's validity must be made manifest in the warrant itself – is a limited rule with an intelligible principle. Not every fact need be particularly stated on the face of the warrant. Rather, a precondition to the valid exercise of executive power must be made manifest in the warrant itself. In the normal course, this is met by describing the place to be searched and the items to be seized. For an anticipatory warrant, this also requires that the triggering condition be specified. But there is no danger of a slippery slope here. Generally, there are no additional preconditions to the validity of a warrant. It is only in the special case of anticipatory warrants that this question of application arises. Thus, there are no legitimate concerns that requiring the triggering condition to be particularly stated will result in confusion or additional litigation over the further particularities for warrants. The principal at work here is clear: if there is a precondition to the valid exercise of executive power, that precondition must be particularly identified on the face of the warrant.[17]

The Government argues that the triggering condition only goes to the probable cause requirement and therefore need not be particularly described. See Pet. Br. 19 ("[T]he text of the Fourth Amendment *does* address the issue. The triggering condition for an anticipatory warrant is an element of probable cause."); *id.* at 24. But this argument is both atextual (contrary to the Government's self-serving description) and entirely question begging. In essence, the Government maintains that Court should consider the "triggering

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[17] As a practical matter, to be valid, warrants must specify a number of particulars beyond place to be searched and items to be seized. For example, the issuing court is specified so that the recipient of the warrant can understand from where the power to search emanates.

condition" to be part of the probable cause showing made to the magistrate. But that does nothing to resolve the admitted problem of the anticipatory nature of that condition, the consequent absence of probable cause at the time of issuance, and the textual bar to the issuance of such warrants. Simply put, the Government contends that the "triggering condition" should be assumed and that the constitutional analysis should be no different than if it were an extant fact. Again, that does nothing more than wish away the problem.

In fact, the triggering condition itself does nothing to *support* probable cause. The fact that the warrant is not operable until a video tape is delivered, for example, does absolutely nothing to establish probable cause. Instead, the triggering condition provides a clear limit on the authority and power of the executing officers. And this is a distinction with a difference in the Fourth Amendment context.

The Fourth Amendment does not require that probable cause be shown on the face of the warrant. This is because probable cause is a legal conclusion that is reached through a complicated balancing of numerous factors. Therefore, a neutral magistrate's decision as to whether probable cause exists is sufficient. In the case of an anticipatory warrant, however, the triggering condition, by definition, has not been determined to have occurred by the magistrate. Instead, the magistrate has stated that *if* the event occurs, the warrant can be executed. And in this capacity, the triggering condition does affect probable cause – probable cause to search is absent until it occurs. The triggering condition also provides an objective limitation on the power of the executing officer. In this way, the triggering condition is similar to the place to be searched or thing to be seized. It provides an objective factual criteria, which must be present for the valid execution of the warrant. If the officer comes to the wrong house, they have no power to enter. Similarly, the officer has no power to execute the warrant in advance of the occurrence of the triggering condition. If a warrant fails to list particularly the

place to be searched, that warrant is invalid. So too if the warrant omits the triggering condition.

The Government tries to justify its rule by stating that anticipatory warrants provide greater protection than any potential alternative. Pet. Br. at 22-23. This argument is a non-sequitor.[18] Whether or not anticipatory warrants may be useful in some cases has absolutely nothing to do with the requirements that attend to those warrants. That the particularity requirement applies to the triggering condition does not render anticipatory warrants a useless tool. To the contrary, all that this would require is some additional words included on the face of the warrant. The Government additionally states that there is a preference for warrants because they provide the unbiased scrutiny of a judicial officer. See *id.* at 23. Ironically, however, it is the Government's rule that would undermine this very scrutiny. The Government's attempt to seek support in the neutral magistrate for its argument that the particularity requirement does not attend to the triggering condition is passing strange in light of the real consequences of the Government's rule.

The fact that the triggering condition may have in fact occurred prior to a search does not insulate that search from challenge. "Even though petitioner acted with restraint in conducting the search, 'the inescapable fact is that this restraint was imposed by the agents themselves, not by a judicial officer.'" *Groh*, 540 U.S. at 561 (quoting *Katz*, 389 U.S. at 356). A search is invalid if it was conducted pursuant to a warrant that impermissibly failed to identify the power to search and the limits of that power and also conferred discretion on the executing offers. Permitting such a search is anathema to the underlying purpose of the Fourth Amendment. The Ninth Circuit's rule should be affirmed.

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[18] The argument is also incorrect. In the face of telephonic warrants, there is an alternative that both safeguards the interests protected by the Fourth Amendment and permits fast police work. *See supra*, Part I.B.

"A contrary rule would, of course, render the warrant requirements of the Fourth Amendment meaningless." *Whiteley*, 401 U.S. at 565 n.8.

C. The History Of The Fourth Amendment Provides Further Support That The Triggering Condition Must Be Particularly Stated On The Face Of The Warrant.

An anticipatory warrant that lacks a particular description of the triggering condition confers upon law enforcement officers significant discretion, which is anathema to the history of the Fourth Amendment. In fact, the Fourth Amendment embodies the Framers' hostility to precisely such grants of authority to officers. See Thomas Y. Davies, *Recovering the Original Fourth Amendment*, 98 Mich. L. Rev. 547, 578 (1999) (explaining that the "delegation of discretionary authority to ordinary, 'petty,' or 'subordinate' officers was anathema to framing-era lawyers"). The Framers' particular concern with the substance of broad discretion was much the same as expressed here—the perceived need to limit the broad discretion of officers to conduct intrusive searches of homes and to thereby disrupt the privacy of the residents and the community's sense of ordered liberty. See William J. Cuddihy, *The Fourth Amendment: Origins and Original Meaning, 602-1791*, at 237 (1990) (unpublished Ph.D. dissertation, Claremont Graduate School, on file with UMI Dissertation Services) ("[G]eneral searches and warrants . . . furnished an infinite power of surveillance to searchers that exposed every Englishman's dwelling to perpetual, capricious intrusion."). As here, the general warrant conferred upon common officers significant power to search and arrest at their discretion. The Framers found this authority especially pernicious given their general distrust of the judgment of common officers. As a result, the restrictions that ultimately became the Fourth Amendment were a central feature of the compromise between the Federalists and the Anti-federalists that made way for the new

federal charter. Davies, *supra*, at 609-11; see also Cuddihy, *supra*, at 1365-79. So strong was the acclamation for such a provision that it was already a feature of many State constitutions at the time the Framers drafted our Constitution. See Cuddihy, *supra*, at 1233-54, 1298-341, 1347-51 (discussing search and seizure in state constitutions). Accordingly, any conferral of the type of authority granted by anticipatory search warrants requires careful scrutiny against a backdrop of well over 200 years of unmitigated hostility to such power.

The lack of particularity in anticipatory warrants likewise represents a departure from the Framers' express intent to strictly limit "unreasonable search and seizures." While the Framers held a great distrust for the common officer, they were unconcerned with passing a congressional standard to regulate the warrantless officer as "they did not perceive ordinary officers as possessing any significant discretionary authority . . . to initiate arrests or searches." Davies, *supra* at 578. Warrants, and not officers, were the main source of search and arrest authority. Framing-era common law gave no more arrest authority to common officers than it did to the general public, which mandated that a warrantless arrest could be justified only by "felony in fact," and nothing so loose as a general standard of "reasonableness." *Id.* Given the limited power of the warrantless officer, the Framers intended to "control the officer by controlling the warrant," and had little reason to believe that the warrant requirement – including the requirement for particularity – would not effectuate such control. See *id.* at 552. Here, however, the Government would not only confer authority upon officers to create probable cause (e.g., by delivering the video-tape), but would also allow them to seek and obtain a warrant where no probable cause existed at the time it was sought. Far from "controlling the warrant," the Government seeks to guarantee "reasonableness through reliance upon the good will of officers, a "deference" that is decidedly "at odds with the

central purpose of the Fourth Amendment, which is distrust of discretionary police power." Tracey Maclin, *The Central Meaning of the Fourth Amendment*, 35 Wm. & Mary L. Rev. 197, 248 (1993).

D. Requiring That The Triggering Condition Be Particularly Stated Imposes No Significant Burden On Law Enforcement.

Requiring that law enforcement include the particularly described triggering condition on the face of the warrant poses no significant burden on law enforcement. This rule is nearly costless to implement, in terms of money, effort, and time. The Government essentially conceded this point. Pet. Br. at 27 ("[T]he burden of describing the triggering condition in an anticipatory warrant (or incorporating the supporting affidavit into the warrant and showing it to the person whose property is being searched) may be minimal.").

After acknowledging that there is no real burden on law enforcement, the Government argues that the rule would nonetheless be costly because the "consequences of an inadvertent failure to comply with the Ninth Circuit's rule are" severe. *Id.* However, there is little reason to fear inadvertent failure to comply with a rule that triggering events be plainly stated on the warrant. As a practical matter, anticipatory warrants are used in the sorts of investigations that involve relatively specialized officers (such as DEA agents in drug cases or postal inspectors in child pornography cases). These specialized officers are capable of learning a simple rule about anticipatory warrants. In any event, "it is not asking too much that officers be required to comply with the basic command of the Fourth Amendment before the innermost secrets of one's home or office are invaded." *Berger*, 388 U.S. at 63.

And again, the Government's argument proves too much. This Court has unequivocally decided that suppression is necessary to "effectuate the guarantee of the Fourth

Amendment against unreasonable searches and seizures" by deterring future constitutional violations. *United States* v. *Calandra*, 414 U.S. 338, 347 (1974). That the remedy of exclusion exists cannot be the basis for altering Constitutional mandates in the first instance. The Court should reject such "cart-before-the-horse" sophistry. Determining the contours of a constitutional rule and whether there has been a constitutional violation has nothing whatever to do with the remedy available. The Government's argument on this score is utterly unhelpful in determining what the constitution requires in the context of anticipatory warrants.

E. Petitioner's Argument That Any Potential Error Can Be Remedied By Suppression Is Both Unconvincing And Incorrect.

One of the central themes in the Government's brief is that any potential error can always be remedied by after-the-fact review. But this turns the Fourth Amendment on its head. The Fourth Amendment was designed to guarantee ex ante review by a neutral magistrate. Review in hindsight is simply not sufficient. The point is that it is not acceptable to "bypass the safeguards provided by an objective predetermination of probable cause," and instead substitute "the far less reliable procedure of an after-the-event justification for the . . . search, too likely to be subtly influenced by the familiar shortcomings of hindsight judgment." *Beck* v. *Ohio*, 379 U.S. 89, 96 (1964). Yet this is precisely what the Government proposes.

The Government argues that any potential error can be cured after the fact, by way of a motion to suppress or an action for damages. *E.g.*, Pet. Br. at 20-21. As a practical matter, however, there is no action for damages *unless* there is a clear constitutional rule as to what the warrant must state on its face. See *Anderson* v. *Creighton*, 483 U.S. 635, 640 (1987) (finding that officers have qualified immunity against section 1983 damage actions unless "the contours of the right [are] sufficiently clear that a reasonable official would

understand that what he is doing violates that right"). If the warrant in this case is permitted – and thus there is no clear requirement that the triggering event be stated on the face of the warrant – there will be no possibility that any damages action could be sustained for an abuse of an anticipatory warrant.

Similarly, there is no suppression for evidence seized under an invalid warrant unless there is a glaring facial deficiency. See *United States* v. *Leon*, 468 U.S. 897, 922-23 (1984). But there cannot be a facial deficiency unless there is a rule that requires the triggering event be stated with particularity. Although the Government would have this Court believe that there is no need to create a clear rule as to the triggering condition, without such a rule, all of the alternative remedies the Government offers are just smoke and mirrors. In the absence of a clear rule, neither suppression nor money damages will be awarded.

Individuals searched generally have to defer any probable cause challenge to a post-search procedure. In fact, the very justification for permitting the remedy for lack of probable cause to be deferred is *because* a neutral magistrate has already determined that probable cause exists. Thus, there is a built-in safeguard. A triggering condition in an anticipatory warrant is qualitatively different. The magistrate has never passed upon the occurrence of the triggering condition. Thus, the basis for permitting the deferral of review is lacking. Moreover, the existence of a triggering condition does not present a question similar to probable cause, which asks how much. A triggering condition is an on/off switch – it either exists or it does not; the warrant is valid or not. There is no weighing and balancing, and there is simply no need to defer review until after the fact. The point is that the person searched is entitled to know the limits of the power of the executing officer. And this purpose can never be served by after-the-fact suppression.

The Government's suggestion that no challenge to the warrant should be made upon execution, is entirely self-serving. Peaceable challenge to the specifics of a search warrant is entirely consistent with the exercise of constitutional rights. Where, as here, the wrong person was in possession of the contraband, such a challenge may be eminently reasonable and efficient. More obvious cases also come to mind – such as cases of mistaken identity or mistaken location – and in such cases, reasonable questioning by the inhabitants should be welcomed by the Government, not discouraged or postponed to subsequent litigation.

Finally, the Government argues that even if the triggering condition must be particularly described, suppression is not an appropriate remedy as long as the triggering condition has in fact been met. But the fact that discretion may have been appropriately exercised does not save the warrant because any restraint was "imposed by the agents themselves, not by a judicial officer." *Katz*, 389 U.S. at 356. Just as the *Groh* warrant was facially invalid, so too here. Because the warrant is invalid, the search of Grubbs' home was warrantless. And warrantless searches of a person's home are deemed unreasonable and unconstitutional.

The Government's argument that any constitutional defect is harmless as long as the triggering condition has actually occurred misses the point. That argument depends on the Government's flawed assertion that the triggering condition goes only to probable cause. It does not; it actually establishes a precondition to the warrant's validity. And to the extent it does, the Government is essentially conceding that probable cause has not been finally determined by the neutral magistrate. The Government cites to cases in which courts have remedied searches found to exceed the scope of the probable cause determination by severing parts of the warrant that are invalid. Pet. Br. at 31. And this makes sense. In that context, the warrant is valid; it is simply overbroad. When a warrant fails to conform to the particularity

requirement in toto, however, it is invalid. Petitioner cites no case law suggesting that an *invalid* warrant can be saved through severance. The cases relied on by Petitioner are beside the point as they do not resolve the issue presented here.

CONCLUSION

For the foregoing reasons, the decision of the Ninth Circuit Court of Appeals should be affirmed.

Respectfully submitted,

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